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No. 97-2061

In The

Supreme Court of the United States

October Term, 1997

RICHARDSON C. BELL, Trustee for Bell Land Trust,

Petitioner,

vs.

CITY OF VIRGINIA BEACH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to grant a Writ of Certiorari to consider argument and theory neither raised nor addressed below?

2. Should the Court exercise its discretion to grant a Writ of Certiorari solely to determine whether the Supreme Court of Virginia misapplied the "bundle of rights" doctrine, after correctly stating the doctrine?

3. Considered in light of all of the facts of this case, was the Supreme Court of Virginia plainly wrong in its interpretation and application of the law of regulatory taking as determined in *Lucas v. South Carolina Coastal Council*?

4. Should this Court exercise its discretion to grant a Writ of Certiorari to review a decision of the Virginia Supreme Court on what is actually a narrow issue of state property rights law?

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STATEMENT OF JURISDICTION

In accordance with 28 U.S.C. § 1257(a), this Court cannot properly exercise jurisdiction over this case. Bell's "Questions Presented" are based upon legal theories never presented to or raised by the Virginia courts. Furthermore, Bell's challenge to the Virginia Supreme Court's decision as either plainly erroneous or the misapplication of the properly-stated rule of *Lucas* does not state a basis for the discretionary exercise of jurisdiction under Rule 10.

CONSTITUTIONAL PROVISION INVOLVED

This case involves application of the just compensation clause of the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Introduction

Richardson Bell, as trustee, sued the City of Virginia Beach for inverse condemnation of lots 21 and 22 of the Chesapeake Park subdivision because a permit required by the Virginia Coastal Primary Sand Dune Protection Act was not granted. The trial court submitted the case to the jury which returned a verdict in favor of Bell for $110,000, plus interest, as compensation for lots 21 and 22. After post judgment motions, the trial court entered its final judgment order on February 28, 1997. On February 27, 1998, the Virginia Supreme Court reversed the judgment of the trial court.[1]

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1. *City of Virginia Beach v. Bell*, 255 Va. 395, 498 S.E. 2d 414 (1998).

B. Statement of Facts

Seawall Enterprises was a corporation owned by Richardson Bell and William L. Page. In 1979 Seawall purchased lots 21 and 22 of the subdivision of Chesapeake Park and four other, similar, lots for $10,000. The lots are seaward of the primary coastal dune on the shore of Chesapeake Bay, at the northern boundary of the City of Virginia Beach.

In 1979 Seawall submitted a plan to the City to develop lots 21 and 22; approval was denied because of "the six foot contour" rule. Seawall submitted at least one other proposal, which was also not approved by the City.

* * *

The Coastal Primary Sand Dune Protection Act[2] became law in 1980. The Act is intended to prevent the destruction of coastal primary sand dunes and beaches. It was enacted in recognition of the damage to the health, safety and welfare of the community that results when the community's natural protective barriers to the sea are weakened or destroyed. The Act declares that it is

> the public policy of the Commonwealth whenever reasonably necessary to preserve and protect coastal primary sand dunes and to prevent their despoliation and destruction and whenever practical to accommodate necessary economic development in a manner consistent with the protection of such features.

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2. Originally codified in Virginia Code Chapter 2.2 of Title 62.1. References are to the sections in effect at the time the Bells' permit application was considered. The Act is now recodified in Chapter 14 of Title 28.2 (Virginia Code §§ 28.2-1400 *et seq.*).

The Act includes a model ordinance, which the City has adopted.[3] Any person who wishes to use or alter a coastal primary sand dune or beach is required to first get a permit under the ordinance. The standards to be applied in considering applications for permits to use coastal primary sand dunes prohibit any permanent alteration of or construction on such dunes that would:

> (i) impair the natural functions of the dune as described herein; (ii) physically alter the contour of the dune; or (iii) destroy vegetation growing thereon unless the wetlands board, or in its absence the Commission, determines that there will be no significant adverse ecological impact, or that the granting of a permit hereunder is clearly necessary and consistent with the public interest considering all material factors.[4]

A local wetlands board is required to base its decision on:

> (1) Such matters raised through the testimony of any person in support of or in rebuttal to the permit application.
>
> (2) Impact of the development on the public health and welfare as expressed by the policy and standards of [the Act] and any guidelines which may have been promulgated thereunder by the Commission.[5]

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3. Virginia Code § 62.1-13.25; Virginia Beach City Code Appendix A — Zoning, Article 16.

4. Virginia Code § 62.1-13.23; City Code Appendix A § 1608.

5. Virginia Code § 62.1-13.25 (9A).

The decision of the local board is reviewable on the record by the Virginia Marine Resources Commission.[6] The decision of the Commission is appealable to the circuit court in accordance with the state Administrative Process Act.[7] The circuit court's role in an appeal is "equivalent to an appellate court's role in an appeal from a trial court."[8]

* * *

In 1982 the corporation dissolved, and Richardson Bell and his wife Linda became the owners of lots 21 and 22. That year the Bells submitted their first plan of development, which was disapproved.

In 1992 the Bells prepared the plan of development for lots 21 and 22 that is the subject of this lawsuit, and applied to the City for the necessary approval. The plan sought to turn lots 21 and 22 into a residential building lot. Because most of this property is located seaward of the dune line, and 15 feet are actually in the intertidal zone, the Bells proposed to literally create a home site from scratch by building and filling a three-sided bulkhead.

When the City determined that the plan involved disturbing the coastal primary sand dune, the application was referred to the Virginia Beach Wetlands Board for approval of the permit required by the Coastal Primary Sand Dune Protection Act. The Board convened, heard evidence, and determined that the

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6. Virginia Code §§ 62.1-13.27, 62.1-13.11, 62.1-13.12 and 62.1-13.13.

7. Virginia Code § 62.1-13.15.

8. *School Board of York County v. Nicely*, 12 Va. App. 1051, 1062, 408 S.E. 2d 545 (1991).

permit should not be granted. The Bells appealed the Board's decision to the Virginia Marine Resources Commission.

The decision of the wetlands board was upheld by the Marine Resources Commission. The Bells appealed to the circuit court which, in a decision that was not appealed, affirmed the conclusion of the Marine Resources Commission that the requested permit should not be granted.

In 1993 the Bells divorced, and lots 21 and 22 were transferred to the "Bell Land Trust," and a third party was named trustee. Bell later became the trustee, and filed the underlying suit on March 29, 1994.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO CONSIDER THE QUESTIONS PRESENTED BY BELL'S PETITION BECAUSE THEY WERE NEITHER RAISED BEFORE NOR ADDRESSED BY THE VIRGINIA SUPREME COURT.

In reviewing decisions of state courts under 28 U.S.C. § 1257 the Court will not consider claims neither raised nor addressed below.[9]

Bell bases his Petition on "three distinct legal and logical errors" — none of which was raised or argued before the Virginia Supreme Court: Bell now contends that the passage of a permitting requirement is not, without more, a regulatory

9. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992). *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in state court, question was not before this Court).

taking. Second, Bell now asserts that the complained-of-interpretation of the Virginia Supreme Court will enable Virginia localities to avoid the "mandatory" compensation remedy for regulatory takings. And finally, Bell now complains that the application of *Lucas* did not correctly address that decision's incorporation of the "background principles of property law."

Instead, before the court below, Bell, in response to the City's assertion that his "bundle of rights" did not include the right to unfettered development of the property, argued only that he as trustee and he and his wife as former owners were essentially the same entity as the predecessor corporate — owner because Bell had been a shareholder of that corporation.[10] The failure of both Bell and the Supreme Court of Virginia to address Bell's now-extensive theories and arguments places the case outside of this Court's purview. Bell shouldn't be able to circumvent this jurisdictional defect by extensive argument, and citation to dozens of decisions, raised now for the first time.

II.

BELL'S "QUESTIONS PRESENTED," SUGGESTING THE MISAPPLICATION OF LAW BY THE VIRGINIA SUPREME COURT, DO NOT STATE ANY BASES UPON WHICH THE COURT SHOULD EXERCISE ITS DISCRETION TO GRANT A WRIT OF CERTIORARI.

In accordance with Rule 10, this Court does not normally grant a writ of certiorari when the asserted error is the misapplication of a properly stated rule of law. Bell's arguments fall into this category. The Virginia Supreme Court stated the applicable language of *Lucas*:

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10. Brief of Appellee to Virginia Supreme Court at 17.

> However, in *Lucas* the Court also recognized that not all categorical takings are compensable. The Court declared that a state may "resist compensation" even in categorical takings, if an "inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. Thus, a property owner may seek compensation for a categorical taking only when the state is exercising power over the 'bundle of rights' that the owner acquired when first obtaining title to the property. *Id.*[11]

The Virginia Supreme Court applied this rule to conclude that the Bells' "bundle of rights" in the property did not include the unfettered right to develop it as a residential building lot. Bell takes issue with this conclusion and argues that the Supreme Court of Virginia should have applied the rule differently. This argument — that of misapplication of a properly stated rule — does not merit the exercise of this Court's discretionary jurisdiction under Rule 10. Alternatively, it is an argument that the Virginia Supreme Court's decision is erroneous, which is also not a reason for this Court to grant a writ of certiorari.[12]

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11. *Bell, supra*, 255 Va. at 400, 498 S.E. 2d at 417, Ap. A-5, 6 of Petition for Certiorari.

12. *Ross v. Moffit*, 417 U.S. 600, 616-17 (1974).

III.

THE VIRGINIA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THE DECISION IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL.*

The factual differences between *Lucas* and this case are significant — and critical. Lucas paid $975,000 to purchase two ready-to-build-on lots, only to have state action, within two years thereafter, flatly ban any building on either of the lots. The Bells, on the other hand, acceded to ownership of two adjoining lots seaward of the dune and in the surf, which had been acquired three years earlier for $3,333, and for which permits to develop had been rejected twice before the passage of the regulating dune statute and ordinance — which also predated Bells' ownership. The Bells' property was never ready-to-build-on in its natural state, as their proposed development plan confirms, and when they acquired it, was subject to the state action. In addition, the Act and ordinance governing the Bell property provided for a hearing, standards governing what might be permitted and the competing interests that must be considered, and the opportunity to resubmit another plan for development.

Under all of the facts of this case, the decision of the Virginia Supreme Court is consistent with *Lucas*. The Bell property was not developable before the dune act and ordinance, and therefore there was no reasonable expectation of development.

The unfettered right to disturb the coastal primary sand dune did not exist when the Bells acquired the property two years after the Act became law. Nor was there in place any permit or plan that would vest such rights in the land. And when the Act became law, it did not appropriate private

property for public use but provided for regulation of the use of property by its owners.

IV.

THE PROCLAIMED CONFLICT IN DECISIONS IS ILLUSORY.

The Virginia Supreme Court decision does not, as Bell asserts, pronounce that Virginia property owners cannot pursue inverse condemnation litigation for claimed regulatory takings. The decision instead says that, in the limited context of this case, under Virginia property law and the constitution as applied by *Lucas*, the regulatory action taken by the City of Virginia Beach under the Virginia Coastal Primary Sand Dune Protection Act was not an unconstitutional taking of property from the Bells. The Bells acquired the property subject to the Act. All of the provisions of that Act were followed, resulting in a final judicial review and decision affirming the regulatory action and the denial of the permit. (This result does not preclude Bell from reapplying for a permit with another development plan.) Had the permit-denial been found to be unconstitutional (that is, a taking), it would have been overruled.

In their appeal to the circuit court of the denial of the permit by the Marine Resources Commission, the Bells had the opportunity to — and did — raise the panoply of issues relevant to their property and its regulation by the Act. These issues include:

> (I) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be

> made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidential support for findings of fact.[13]

Thus, the regulation of the coastal primary dune and beach was carried out as contemplated by the legislature, and reviewed by the circuit court. The Bells had their day in court with respect to the specific development plan submitted and the permit applied for. They acquired the property subject to the Act and were afforded all of their rights in accordance with the Act.

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13. Administrative Process Act, Virginia Code § 9-6.14:17, Issues on Review.

CONCLUSION

The Virginia Supreme Court's decision in this case not only correctly applies *Lucas* in such a state regulatory scheme, but also demonstrates its validity and vitality.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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